

Hearing Date and Time: November 15, 10:00 a.m. (EST)
Objection Deadline: November 8

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

SEARS HOLDINGS CORPORATION, et al.,

Debtors.

Chapter 11

No. 18-23538 (RDD)

(Jointly Administered)

**RESERVATION OF RIGHTS OF THE UNITED STATES WITH RESPECT TO
MOTION OF DEBTORS FOR ENTRY OF ORDER (I)(A) APPROVING BIDDING
PROCEDURES FOR SALE OF SEARS HOME IMPROVEMENT BUSINESS, (B)
APPROVING STALKING HORSE BID PROTECTIONS, (C) SCHEDULING AUCTION
FOR AND HEARING TO APPROVE SALE OF SEARS HOME IMPROVEMENT
BUSINESS, (D) APPROVING FORM AND MANNER OF NOTICE OF SALE,
AUCTION, AND SALE HEARING, (E) APPROVING ASSUMPTION AND
ASSIGNMENT PROCEDURES, (II) APPROVING THE SALE OF SEARS HOME
IMPROVEMENT BUSINESS IN ACCORDANCE WITH THE STALKING HORSE
AGREEMENT AND (III) GRANTING RELATED RELIEF**

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The United States of America (the “United States” or the “Government”), by its attorney Geoffrey S. Berman, United States Attorney for the Southern District of New York, respectfully submits this reservation of rights with respect to the *Motion of Debtors for Entry of Order (I)(A) Approving Bidding Procedures for Sale of Sears Home Improvement Business, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for and Hearing to Approve Sale of Sears Home Improvement Business, (D) Approving Form and Manner of Notice of Sale, Auction, and Sale Hearing, (E) Approving Assumption and Assignment Procedures, (II) Approving the Sale of Sears Home Improvement Business in Accordance with the Stalking Horse Agreement and (III) Granting Related Relief*, Docket No. 450 (the “SHIP Sale Procedures Motion”).

By filing this reservation of rights, the Government notifies Debtors, the stalking horse buyer, any prospective buyers, creditors, and all other parties in interest in these bankruptcy cases of the Government’s interest in ensuring that any buyer of the Sears Home Improvement Products, Inc. (“SHIP”) business complies with the terms of a consent decree entered into between SHIP and the United States, acting on behalf of the Environmental Protection Agency (“EPA”). The consent decree relates to compliance with EPA rules governing renovations or other work in homes and other facilities with lead-based paint. The Government reserves its right to object to any sale proposed sale to the extent that a prospective buyer does not agree to abide by such terms.

Specifically, on December 6, 2016, the United States, acting on behalf of EPA, entered into a consent decree with SHIP. *See United States v. Sears Home Improvement Products, Inc.*, No. 16-cv-9302 (N.D. Ill.), Dkt. No. 12 (Dec. 6, 2016) (the “Consent Decree”). The Consent Decree resolved the Government’s claims that SHIP had violated the Toxic Substances Control Act (“TSCA”), 15 U.S.C. §§ 2682(c), 2686(b), & 2687, and the regulations promulgated

thereunder, codified at 40 C.F.R. Part 745, Subpart E (“Residential Property Renovation Rule” or “RRP Rule”). The RRP Rule requires that firms performing certain renovation, repair and painting projects for compensation that disturb lead-based paint in homes, child care facilities, and kindergartens built before 1978 must be certified by EPA or an EPA-authorized State or Tribal program, and must use certified renovators who follow specific work practices to prevent lead contamination. The Consent Decree requires compliance with the RRP Rule and also contains certain other compliance, self-monitoring, and reporting requirements.

According to the Government’s complaint, SHIP failed to ensure that: (i) in conducting its home renovation business, owners and occupants of housing and child-occupied facilities received information on lead-based paint hazards before renovations began; (ii) individuals performing the renovations were properly trained and certified; and (iii) specified work practices required by the RRP were followed during the renovations to reduce the potential for lead-based paint exposure. *See United States v. Sears Home Improvement Products, Inc.*, No. 16-cv-9302 (N.D. Ill.), Dkt. No. 1 (Sept. 28, 2016).

By its own terms, the Consent Decree’s obligations survive a change in ownership or operation of SHIP’s business or any portion thereof. Specifically, the Consent Decree states: “The obligations of this Consent Decree apply to and are binding upon the United States, and upon Defendant and any successors, assigns, or other entities or persons otherwise bound by law.” *Id.* ¶ 4. The Consent Decree further provides that “[n]o change in corporate status or ownership shall affect Defendant’s obligations under this Consent Decree,” and requires SHIP to give notice of the terms of the Consent Decree to any “prospective successor owner or operator of the corporation or portion thereof” and to the EPA at least 30 days prior to a sale. The Consent Decree also states that “[n]o such sale or transfer shall relieve Defendant of any

obligation set forth herein unless agreed to in writing by the United States and approved by the Court.” *Id.* ¶ 5.

In order to protect the public from the risks of lead-based paint, the Government has an interest in ensuring that any potential buyer comply with the Consent Decree. However, the Government does not take a position on any matters related to bidding procedures themselves (as distinct from the terms of any sale), and accordingly has not filed an objection to Dkt. No. 450. Moreover, the proposed order accompanying the SHIP Sale Motion specifies that objections to a sale be made by December 11, 2018. *See* SHIP Sale Procedures Proposed Order ¶ 14 (“Objections to the Sale Transaction, including any objection to the sale of the Assets free and clear of liens, claims, interests, and encumbrances pursuant to section 363(f) of the Bankruptcy Code and entry of a Sale Order” shall “be filed with the Court and served on the Objection Recipients by no later than December 11, 2018, at 4:00 p.m.”). Accordingly, the Government hereby respectfully reserves its rights to object or to take any other legally appropriate action to the extent that the prospective buyer of the SHIP business (whether the stalking horse bidder or another entity) purports not to adhere to SHIP’s ongoing obligations under the Consent Decree.

Dated: New York, New York
November 14, 2018

Respectfully submitted,

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